KOPERASI WANITA SARAWAK BHD & ANOR

v.

ROBERT SIM TECK HOCK

COURT OF APPEAL, PUTRAJAYA
ABDUL KADIR SULAIMAN JCA
TENGKU BAHARUDIN SHAH JCA
CLEMENT SKINNER J
[CIVIL APPEAL NO: Q-02-802-2000]
18 MAY 2005

LAND LAW: *Caveat - Validity - Caveat lodged to protect beneficial interest in land under trust deed - Land not vested in trustee when trust was declared - Letters supporting validity of trust deed not attached to caveat application form when lodged - Delay in taking steps to enforce beneficial interest after lodging caveat - Whether caveat rendered invalid*

TRUSTS: *Trusts - Constitution - Validity - Property not vested in trustee when trust deed was created - Whether trust not completely constituted - Whether trust rendered invalid*

TRUSTS: *Trusts - Constitution - Volunteer - Whether beneficiary a volunteer under trust deed - Whether trust deed not completely constituted - Whether court will not render assistance to a volunteer of an incompletely constituted trust*

The first appellant had, by letter of application dated 23 November 1979, applied to the relevant authorities for the alienation of some 36 acres of land ('the land'). By a trust deed dated 18 June 1981 ('the trust deed'), the first appellant declared itself as trustee for nine beneficiaries in proportionate shares as stipulated in the trust deed. The respondent being one of the beneficiaries had 15% beneficial interest in the land. The respondent and the other beneficiaries had not paid any consideration for their beneficial interests in the land. The trust deed stated that the first appellant would, at the request and costs of the beneficiaries, transfer their respective shares upon alienation of the land. At the material time when the trust deed was executed on 18 June 1981, the land was yet to be alienated by the authorities to the first appellant. The land was only alienated to the first appellant on 27 July 1984, some three years later. The respondent claimed he had increased his beneficial interest in the land to 25% when he acquired 5% beneficial interest each from two other beneficiaries for a consideration. On 15 November 1984, the first appellant entered into an agreement with one company called Unibor Sdn Bhd for the development of the land and the said company lodged a caveat on the

land on 10 November 1987. Subsequently, the respondent entered a caveat on the land on 1 October 1993 claiming beneficial interests in 1/4 th undivided share of the land. It followed that the second appellant agreed to grant a loan to Unibor Sdn Bhd to develop the land in consideration of a memorandum of charge being executed and entered on the land. The memorandum of charge was duly executed on 23 October 1999 and was presented to the Land Office. The Registrar of the Land Office then issued a notice to the respondent that his caveat would be deemed to have lapsed after three months it was lodged unless further extended or otherwise ordered by the court. Accordingly, the respondent filed an application to the High Court for extension of time and was granted the application by the learned Judicial Commissioner ('JC'). Hence, the appellants' appeal against the decision of the JC.

Held (allowing the appeal with costs)
Per Abdul Kadir Sulaiman JCA delivering the judgment of the court:

[1] A trust is only valid if the title to the property is vested in the trustee completely and if the trust has been validly declared. In the present case, the trust deed was created on 18 June 1981 when the first appellant had no title, right or interest at all in the land. All that the first appellant did was to make an application by letter dated 23 November 1979 to the relevant authorities for alienation of the land. A trust cannot be created over the mere application letter for the land. In the circumstances, the trust deed was not completely constituted. It followed that the respondent's lodgment of the caveat on the land was invalid in law. (pp 197 h & 198 a-b)

[2] There was misdirection by the JC when he did not decide on the issue of whether the respondent was a volunteer and also whether the trust deed in respect of a future expectancy would be enforced by the court. The issue of whether the respondent was a volunteer was a question of law to be determined by the court. It is trite that questions of law need not be raised in the affidavits. It is for counsel to raise the questions of law and make the legal submissions to the court. The said issue was raised in the appellants' written submission and was also argued by counsel for both parties in the High Court below. Therefore, the said issue was squarely and rightly before the court and the court was under a duty to deal with it which was crucial to the determination of whether the trust deed was valid. (pp 198 e-g & 199 d)

[3] The respondent did not give any consideration whatsoever for the creation of the trust. He was a mere volunteer. The court will not render assistance to a volunteer of an incompletely constituted trust. (p 200 f)

[4] The respondent relied upon his letter dated 12 August 1999 addressed to the first appellant and the first appellant's letter of reply dated 4 February 2000 to support the validity of the trust deed. However, those two letters were not attached to the caveat application form lodged on 1 October 1993. Those two letters were only exhibited by the respondent in his fourth affidavit affirmed on 2 May 2000 more than six years after the lodgment of the caveat form. The respondent's letter dated 12 August 1999 showed it was the first time in eighteen years the respondent took the trouble to inquire of the transfer of his interest in the land. There was no explanation from the respondent as to why he had slept on that matter for 18 years. It is settled law that the court must, at the first stage of the inquiry, confine itself to the caveat application form itself when the caveat was lodged and not any other evidence. The JC did not make any reference to the grounds relied upon by the respondent in his caveat application and that amounted to a misdirection on his part. (p 201 a-e)

[5] The purpose of the respondent filing a caveat on the land was to preserve the *status quo* pending timeous steps to be taken by him to enforce his alleged interest in the land by commencing proceedings in court. The respondent entered the caveat on 1 October 1993. Even when he applied to the High Court on 4 January 2000 for the extension of the caveat he did not commence any legal proceedings to enforce his alleged interest in the land. He only filed the writ on 6 September 2000 and served it on the appellant on 7 December 2000. There was no explanation given for the delay of about seven years. The delay was inordinate, inexorable and fatal to the respondent's case. (pp 201 f-g & 202 g)

[Caveat ordered to be removed forthwith.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Perayu pertama melalui suatu surat permohonan bertarikh 23 November 1979 memohon kepada pihak-pihak berkuasa berkenaan untuk diberimilik 36 ekar tanah (tanah tersebut'). Melalui suatu suratikatan amanah ('suratikatan amanah tersebut'), perayu pertama mengisytiharkan diri sebagai pemegang amanah bagi 9 benefisiari-benefisiari mengikut pembahagian masing-masing seperti ternyata di dalam suratikatan tersebut. Responden yang merupakan salah satu daripada benefisiari-benefisiari tersebut mempunyai 15% kepentingan benefisial di dalam tanah tersebut. Responden dan lain-lain benefisiari tidak membayar apa-apa balasan untuk kepentingan benefisiari mereka. Suratikatan mencatatkan bahawa perayu pertama atas kehendak dan kos benefisiari-benefisiari akan pindah milik

pembahagian benefisiari-benefisiari berkenaan selepas pemberimilikan tanah tersebut. Pada masa suratikatan tersebut dilaksanakan pada 18 Jun 1981, tanah tersebut belum diberimilik oleh pihak-pihak berkuasa berkenaan kepada perayu pertama. Tanah tersebut hanya diberimilik kepada perayu pertama pada 27 Julai 1984, iaitu tiga tahum kemudiannya. Responden mendakwa ia telah meningkatkan kepentingannya dalam tanah tersebut kepada 25% apabila ia memperolehi 5% kepentingan benefisial masing-masing daripada dua orang benefisiari untuk balasan. Pada 15 November 1984, perayu pertama memasuki satu perjanjian dengan sebuah syarikat bernama Unibor Sdn Bhd untuk pembangunan tanah tersebut dan syarikat tersebut memasuki suatu kaveat terhadap tanah tersebut. Kemudiannya, responden memasuki suatu kaveat terhadap tanah tersebut pada 1 Oktober 1993 menuntut kepentingan benefisial 1/4 pembahagian tanah tersebut yang tidak terbahagi. Ianya mengikut bahawa perayu kedua bersetuju untuk memberi pinjaman kepada Unibor Sdn Bhd bagi pembangunan tersebut atas balasan suatu memorandum gadaian dilaksanakan. Memorandum gadaian tersebut pun dilaksanakan pada 23 Oktober 1999 dan dikemukakan kepada Pejabat Tanah. Seterusnya, Pendaftar Pejabat Tanah mengeluarkan suatu notis kepada responden bahawa kaveat responden akan disifatkan sebagai telah luput selepas tiga bulan ianya dimasukkan kecuali hanya ianya dilanjutkan masa atau sepertimana diperintah mahkamah. Dengan itu responden pun memfail suatu permohonan kepada Mahkamah Tinggi untuk lanjutan masa dan permohonan tersebut dibenarkan oleh yang arif Pesuruhjaya Kehakiman ('PK'). Maka, rayuan perayu-perayu ini terhadap keputusan PK itu.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Abdul Kadir Sulaiman HMR menyampaikan penghakiman mahkamah:

[1] Suatu amanah hanya sah jika hakmilik harta diletakhak kepada pemegang amanah dengan sempurnanya dan jika amanah tersebut telah diisytiharkan dengan sah. Dalam kes semasa, suratikatan amanah di buat pada 18 Jun 1981 semasa perayu tiada apa-apa hakmilik, hak atau kepentingan dalam tanah tersebut. Apa yang perayu pertama hanya buat ialah untuk memohon melalui surat bertarikh 23 November 1979 kepada pihak-pihak berkuasa berkenaan untuk diberimilik tanah tersebut. Suatu amanah tidak boleh dibuat atas hanya suatu surat permohonan untuk tanah tersebut. Dalam keadaan itu, suratikatan amanah tidak disempurnakan. Ianya mengikut bahawa kaveat responden atas tanah tersebut tidak sah dari segi undang-undang.

[2] PK tersalah arah apabila beliau tidak memutuskan isu sama ada responden adalah seorang "volunteer" dan juga sama ada suratikatan amanah berkaitan jangkaan yang diharapkan mungkin di kuatkuasakan oleh mahkamah. Isu sama ada responden adalah "volunteer" adalah suatu persoalan undang-undang yang mesti ditentukan oleh mahkamah. Biasanya, persoalan-persoalan undang-undang tidak perlu di bangkitkan dalam afidavit-afidavit. Persoalan-persoalan tersebut adalah bagi peguam untuk membangkitkannya dan membuat penghujahan-penghujahan di sisi undang-undang di hadapan mahkamah. Dalam kes semasa, isu tersebut telah pun dibangkitkan dalam penghujahan-penghujahan tulis perayu-perayu dan juga dalam perbalahan peguam-peguam kedua-dua pihak dalam Mahkamah Tinggi di bawah. Dengan itu, isu tersebut adalah di hadapan mahkamah dan mahkamah bertanggungjawab untuk menentukannya di mana ianya mustahak bagi memutuskan sama ada suratikatan amanah tersebut adalah sah.

[3] Responden tidak memberi apa-apa balasan untuk amanah tersebut. Mahkamah tidak akan menolong seorang "volunteer" suatu amanah yang tidak disempurnakan.

[4] Responden bergantung kepada suratnya bertarikh 12 Ogos 1999 kepada perayu pertama dan surat jawapan dari perayu pertama bertarikh 4 Februari 2000 untuk menyokong kesahan suratikatan amanah tersebut. Tetapi surat-surat tersebut tidak dilampirkan dengan borang permohonan kaveat yang diserahkan pada 1 Oktober 1993. Kedua-dua surat tersebut hanya dieksibitkan oleh responden di dalam afidavit keempatnya yang disahkan pada 2 Mei 2000 iaitu lebih enam tahun selepas borang kaveat tersebut diserahkan. Surat responden bertarikh 12 Ogos 1999 menunjukkan bahawa ianya adalah kali yang pertama dalam masa 18 tahun responden mengambil berat untuk mengambil tahu mengenai pindahmilik kepentingannya dalam tanah tersebut. Ianya adalah undang-undang tetap bahawa mahkamah mesti, pada tahap pertama siasatan, mengehadkan kepada borang permohonan caveat sahaja apabila kaveat berkenaan dimasukkan dan bukan kepada keterangan lain. PK tidak buat apa-apa rujukan kepada alasan-alasan yang digantung oleh responden dalam permohonan kaveatnya dan PK tersalah arah dalam berbuat demikian.

[5] Tujuan responden memfail kaveat atas tanah tersebut adalah untuk memelihara *status quo* sehingga langkah-langkah sewajarnya diambil untuk menguatkuasakan dakwaan kepentingannya dalam tanah tersebut melalui prosiding mahkamah. Responden memasukkan kaveat pada 1 Oktober 1993. Walaupun dia memohon kepada Mahkamah Tinggi pada 4 Januari 2000 untuk melanjutkan masa kaveat, dia tidak memulakan apa-apa prosiding

di sisi undang-undang untuk menguatkuasakan dakwaan kepentingannya itu. Dia hanya memfail writ pada 6 September 2000 dan menyampaikannya kepada perayu pada 7 Desember 2000. Tiada penjelasan yang diberi bagi kelewatan hampir tujuh tahun itu. Kelewatan itu adalah berlebihan, tidak dapat disekat dan malang bagi kes responden.

Kaveat diperintah untuk dikeluarkan.]

Case(s) referred to:
Goh Paik Swan v. Ng Choo Lum [1997] 1 CLJ 77 CA ***(refd)***
Hew Sook Ying v. Hiw Tin Hee [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120 SC ***(refd)***
Lee Eng Teh & Ors v. Teh Thiang Seong & Anor [1967] 1 MLJ 42 ***(refd)***
Lim Ah Moi v. AMS Periasamy Suppiah Pillay [1997] 3 CLJ 629 CA ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(refd)***
Milroy v. Lord [1862] 4 De GF & J 264 ***(refd)***
Re Application by Dow Jones (Asia) Inc [1988] 1 MLJ 222 ***(refd)***
Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***
Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals [1994] 3 CLJ 21 SC ***(refd)***

Legislation referred to:
Land Code (Sarawak), ss. 173, 178

Other source(s) referred to:
Prof Jill E Martin, *Hanbury & Martin Modern Equity*, 16th edn, 2001, p 69

For the appellant - Victor LF Wong; M/s Victor Wong & Chiew
For the respondent - Alvin SL Yong; M/s Tan, Yap & Tang

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:
We had on 29 January 2004 allowed the appellants' appeal with costs and ordered that the caveat lodged on the land by the respondent on 1 October 1993 be removed forthwith. We now give our reasons for doing so.

First, we state the background facts leading to the respondent to lodge a caveat on the land. The first appellant, Koperasi Wanita Sarawak Berhad had by letter of application dated 23 November 1979 applied to the relevant authorities for the alienation of 36 acres of land under Lots 150, 149, 1677, 1693, 1695 and part of Lot 51 Miri Concession Land District ("the land").

By a Trust Deed dated 18 June 1981 ("the trust deed"), the first appellant declared itself as the trustee in the application letter to the relevant authorities for alienation of the land in trust for the parties and in the proportionate shares as stated in schedule one of the trust deed. There are 9 beneficiaries under the trust deed. The respondent, Robert Sim Teck Hock had a 15% beneficial interest, Helena Vida Bayang had 5% beneficial interest and Jorkinah bt. Hashim also had 5% beneficial interest.

We note from the trust deed found at pp. 106 to 109 of the appeal record that there was no consideration at all stated or paid by the respondent to the first appellant for his 15% beneficial interest in the said application for the land. The other beneficiaries too had not paid any consideration for their respective beneficial interest.

It is stated in the trust deed that the first appellant will at the request and costs of the beneficiaries named therein transfer their respective shares upon alienation of the land. At the material time when the trust deed was executed on 18 June 1981 the land was yet to be alienated by the authorities to the first appellant. The land was only alienated to the first appellant on 27 July 1984, some three years later.

Subsequently by a deed dated 24-12-1981 entered into between the respondent and Helena Vida Bayang ("the first deed") and for a consideration of RM75,000 the respondent purported to acquire by way of assignment the 5% beneficial share of Helena Vida Bayang. By another deed dated 6 April 1983 entered into between the respondent and Jorkinah bt Hashim ("the second deed") and for a similar consideration of RM75,000 the respondent purported to acquire by way of assignment the 5% beneficial share of Jorkinah bt Hashim. Therefore the respondent claimed that he had increased his beneficial interest to 25% (1/4th share) in the land.

On 15 November 1984, that is about four months after the land was alienated to the first appellant, the first appellant entered into an agreement with Unibor Sdn Bhd for the development of the land ("the development agreement"). Under the development agreement the first appellant had granted Unibor Sdn Bhd the sole right to develop the land on behalf of the first appellant.

In accordance with cl. 2(a) of the development agreement the first appellant had on 15 November 1984 granted to Unibor Sdn Bhd an irrevocable power of attorney to develop the land and to act in the name of the first appellant in any court of law or other proceeding arising out of or in relation to the land. Unibor Sdn Bhd also lodged a caveat on the land on 10 November 1987.

On 1 October 1993 the respondent entered a caveat on the land under s. 173 of the Sarawak Land Code (Cap 81) claiming to be beneficially interested in 1/4th undivided share of the land. This caveat was entered by the respondent more than 12 years after the date of the trust deed and nine years after the alienation of the land to the first appellant. The respondent's case is that he had acquired a 1/4th beneficial interest in the land pursuant to the trust deed, the first deed and the second deed.

The second appellant Mr Yong Chee Poh had agreed to grant a loan to Unibor Sdn Bhd to develop the land. Mr. Yong Chee Poh had agreed to grant the loan in consideration of a memorandum of charge being executed and entered on the land. The memorandum of charge was executed on 23 October 1999 and upon its presentation to the Land Office, the Registrar of Land and Survey Department, Miri Division issued a notice dated 4 November 1999 to the respondent under s. 178 of the Sarawak Land Code. The Registrar's Notice stated that the caveat of the respondent of 1 October 1993 shall be deemed to have lapsed after the expiry of three months from the date thereof unless further extended or otherwise ordered by the court.

On 4 January 2000 the respondent filed the Originating Summons under s. 178 of the Sarawak Land Code seeking an order from the High Court in Miri that the caveat lodged by him on 1 October 1993 affecting his 1/4th undivided right, title, share and interest in the land shall not lapse and shall not be removed and shall be allowed to remain on the land register until further order.

On 27 October 2000 the learned Judicial Commissioner ordered that the caveat lodged on the land by the respondent on 1 October 1993 shall not lapse and shall not be removed but shall be allowed to remain on the land register until further order. The appellants appealed to this court against the said decision of the learned Judicial Commissioner.

Trust Deed Not Completely Constituted

The appellants counsel had attacked the learned Judicial Commissioner's decision on several grounds. We will deal with some of the grounds which merit our consideration. In this appeal before us we find that the trust purported to be created under the trust deed of 18 June 1981 was an incompletely constituted trust. When the trust deed was created on 18 June 1981 the first appellant had no title, right or interest in the land. The first appellant had only made an application by letter dated 23 November 1979 to the relevant authorities for alienation of the land. A mere application letter does not create any title, right or interest in the land. The land was only alienated to the first

appellant on 27 July 1984 more than three years later. A trust is only valid if the title to the land is vested in the name of the trustee, in this case, the first appellant, which was not the case then. Therefore a declaration by the first appellant under the trust deed on 18 June 1981 that it holds the land on trust for the respondent and the other 8 beneficiaries when the first appellant then had no title at all to the land is ineffective and invalid in law and in equity. It is an incompletely constituted trust. It is settled law that the courts will not enforce an incompletely constituted trust.

This basic principle of law is clearly stated in the leading text *Hanbury & Martin Modern Equity* by Professor Jill E. Martin – 16th edn (2001) at p. 69 as follows:

> Completely and Incompletely Constituted Trusts. There cannot be a trust unless the trust is completely constituted. This heading is therefore irrational; it is dealing, not with two different types of trust, but with a rule for distinguishing what is a trust from something that is void. Nevertheless, it is convenient to make the point here, and to deal in more detail with the matter below.
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> A trust is only valid if the title to the property is in the trustee and if the trusts have been validly declared. A declaration that A holds on trust for B is ineffective if the property is not vested in A. The trust becomes constituted and valid when the property is vested in A. The form of transfer to A depends on the nature of the property – land, chattel, money, shares in a company, copyrights, patents, debts or other choses in action – and the appropriate method must of course be used. In the case of a trust of land there must also be written evidence of the declaration of trust. The settlor may of course declare himself trustee, and there is then an automatic constitution, because title was in the settlor throughout. Testamentary trusts are always completely constituted; for the executors, if not the trustees themselves, are under a duty to transfer the trust property to the nominated trustees.
>
> Although no trust is created unless the trust is completely constituted, there are situations where intended beneficiaries under an incompletely constituted trust may compel the transfer of the property to the trustees. In general, they can do so if they have given consideration, but not if they are volunteers, for there is yet no trust and "equity will not assist a volunteer."

In the case of trusts by transfer, a further step is required to completely constitute the trust, the classic statement of which is found in the judgment of Turner LJ in *Milroy v. Lord* [1862] 4 De GF & J 264 at 274-275; 45 ER 1185 at 1189-90:

> I take the law of this Court to be well settled, that in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried.

The case of *Milroy v. Lord* was followed and applied by our Supreme Court in the case of *Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals* [1994] 3 CLJ 21 where it was held as follows:

> The three essentials of a valid trust are: (a) certainty of words; (b) certainty of subject; and (c) certainty of object. Looking at the seven trust deeds except for that in Civil Appeal No 5, there is certainty of words and also there is certainty of object, ie the names of beneficiaries, but there is no certainty of subject, ie trust property, *viz* the lands, because the beneficial ownership of the lands passed to the purchasers of those subsidiary agreements of sale and purchase in 1969 when the sale of these lands took place, ie before the trust deeds were executed. The Lee brothers, named as the trustees of these trust deeds, were also the settlors of the trusts created by those trust deeds. It is a rule that a settlor must vest the trust property (subject) in the trustee completely, please see *Milroy v. Lord*. How could the settlors (the Lee brothers), vest the lands in themselves as trustees when, at the time of signing the trust deeds, they were not owners of the lands both in law and equity as well? Please see Lysaght.

It is manifestly clear to us from the above authorities that a trust is only valid if the title to the property is vested in the trustee completely and if the trust has been validly declared. In this case before us, the trust deed was created on 18 June 1981 when the first appellant had no title, right or interest at all in the land. All that the first appellant did was to make an application by letter dated 23 November 1979 to the relevant authorities for alienation of the land.

A mere application letter does not create any title right or interest in the land. A trust cannot be created over the mere application letter for the land. In light of the fact that the first appellant had no title, right or interest at all in the land when the trust deed was created it follows that the trust deed was not completely constituted and the alleged declaration of trust by the first appellant on 18 June 1981 in favour of the respondent and the other 8 beneficiaries is ineffective, null and void.

It follows from the above that the respondent's lodgment of the caveat on the land based on his alleged claim of 1/4th beneficial interest in the land under the trust deed and the first deed and second deed is invalid in law. We hold that the respondent has no caveatable interest in the land when he lodged the caveat on 1 October 1993 and the caveat must be removed forthwith without the necessity of going any further. In the case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713 the Court of Appeal held:

> The first stage is the examination of the grounds expressed in the application for the caveat. If it appears that the grounds stated **therein are insufficient in law** to support a caveat, **then cadit quaestio,** and the caveat must be removed without the necessity of going any further. (Court's emphasis)

The Respondent Is A Volunteer

We next find that the learned Judicial Commissioner did not decide on the issue whether the respondent is a volunteer and whether the trust deed in respect of a future expectancy will be enforced by the court. He left this issue undecided. His reasoning for doing so was mainly that "The question as to whether the plaintiff is a volunteer or otherwise was never raised in the affidavits of both parties and in the absence of any evidence to that effect it is my view that such issue cannot be properly determined by the wording of the trust deed alone". (appeal record page 26).

We find that this was a misdirection by the learned Judicial Commissioner. The issue of whether the respondent is a volunteer is a question of law to be determine by the court. It is trite law that questions of law need not be raised in the affidavits. It is for counsel to raise the questions of law and make the legal submissions to the court. In *Re Application by Dow Jones (Asia) Inc*, [1988] 1 MLJ 222 at 225 and 226 it was held as follows:

> It seems to me that if affidavits were allowed to contain arguments there will be no need for the assistance of counsel at the hearing in court. The point I make was also the subject of comment by Lord Justice Roskill (as he then was) in *Alfred Dunhill Ltd v. Sunoptic SA (2)* at p. 352 thus:

> I hope it is not out of place to say at this stage that the affidavits filed on both sides are in at least two cases very much too long. Affidavits are designed to place facts, whether disputed or otherwise, before the tribunal for whose help they are prepared. They are not designed as a receptacle for or as a vehicle for legal arguments. Draftsmen of affidavits should not, as a general rule, put into the mouths of the intended deponents legal arguments of which those deponents are unlikely ever to have heard. Legal arguments, especially in interlocutory proceedings, should come from the mouths of those best qualified to advance them and not be put into the mouths of the deponents. There has been much unnecessary paper in this case brought about by the inclusion of the legal arguments in affidavits.
>
> So, once again, in giving leave to file, if necessary, a fresh affidavit, I would urge those responsible for drafting it to comply with Order 41 rule 5 and leave out of the affidavits matters relating to submissions and contentions which are for counsel to deal with at the hearing.

The issue of the respondent being a volunteer was raised in the appellants written submission and was also argued by counsel for both parties in the High Court below. Therefore the issue was squarely and rightly before the court and the court was under a duty to deal with the issue. This issue was crucial to the determination of whether the trust deed was valid.

In the case of *Yeong Ah Chee v. Lee Chong Hai & Anor and Other Appeals* [1994] 3 CLJ 21 the Supreme Court held as follows:

> A volunteer is a beneficiary who has not given any valuable consideration (in the usual sense of the ordinary law of contract), for the creation of a settlement or trust.
>
> It is a settled rule of equity that a court of equity would not render assistance to a volunteer in the case of an incompletely constituted trust.
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> An incompletely constituted trust is one in which the trust property has not been finally and completely vested in the trustee.

Again in the case of *Lee Eng Teh & Ors v. Teh Thiang Seong & Anor* [1967] 1 MLJ 42 at 44 Gill J held that:

> The next question to be considered is whether the promise made by the first defendant constituted a trust which is enforceable. Whether a trust is enforceable or not depends upon whether it is completely or an incompletely constituted trust. A trust is said to be completely constituted when the trust property has been vested in trustees for the benefit of the beneficiaries: until that has been done the trust is incompletely constituted. The distinction between completely and incompletely constituted trusts is of importance principally with regard to the question of consideration. In other words, the question to be considered is

whether valuable consideration was given for the creation of the trust. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect an imperfect conveyance for value by treating it as a contract to convey. But there is no equity to perfect an imperfect voluntary trust. As was said by Lord Eldon in *Ellison v. Ellison*:

> I take the distinction to be, that if you want the assistance of the court to consitute a cestui que trust, and the instrument is voluntary, you shall not have that assistance, for the purpose of constituting a *cestui que* trust, as upon a covenant to transfer stock, if it rests in covenant, and is purely voluntary, this court will not execute that voluntary covenant, but if the party has completely transferred stock, though it is voluntary, yet the legal conveyance being effectually made, the equitable interest will be enforced by this court.

The general principle applicable has been enunciated by Turner LJ in *Milroy v. Lord,* as follows:

> In order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual; and will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes … But, in order to render the settlement binding, one or other of these modes must (as I understood the law of this court) be resorted to, for there is no equity in this court to perfect an imperfect gift.

In the case before us now, the trust was incompletely constituted and further the respondent did not give any consideration whatsoever for the creation of the trust. He is a mere volunteer. The court, therefore, will not render assistance to a volunteer in the case of an incompletely constituted trust.

Examination Of The Caveat Form

An examination of the caveat lodged on the land by the respondent in Form O under s. 173 of the Sarawak Land Code shows that the respondent had caveated the land in respect of his claim for his 1/4 share in the land based on the trust deed, the first deed and the second deed. We have explained above that the trust deed was incompletely constituted and was invalid and ineffective in law.

The respondent has subsequently relied upon his letter dated 12 August 1999 addressed to the first appellant and the first appellant's reply dated 4 February 2000 to support the validity of the trust deed. However these two letters were not attached to the caveat application form lodged on 1 October 1993. These two letters were only exhibited by the respondent in his fourth affidavit affirmed on 2 May 2000 which was more than six years after the lodgment of the caveat form. The respondent's letter dated 12 August 1999 shows that this is the first time in eighteen years that the respondent had taken the trouble to inquire of the transfer of his interest in the land. There is no explanation from the respondent as to why he had slept on this matter for eighteen years. It is settled law that the court must at the first stage of the inquiry confine itself to the caveat application form itself when the caveat was lodged and not any other evidence.

In the case of *Goh Paik Swan v. Ng Choo Lum* [1997] 1 CLJ 77 the Court of Appeal removed the caveat and held at p. 87 that:

> Here is a case of a caveator entering his caveat upon one ground and later, on finding that that ground was unsustainable, seeking to sustain the caveat on some other alternative ground not stated in Form 19B. This, quite apart from being impermissible, also demonstrates the hopelessness of the caveator's claim to the titles.

We find that the learned Judicial Commissioner did not in his judgment make any reference to the grounds relied upon by the respondent in his caveat application form and this non-direction by the Judicial Commissioner amounted to a misdirection on his part.

Delay

It is settled law that the purpose of the respondent filing a caveat on the land is to preserve the *status quo* pending the respondent taking timeous steps to enforce his alleged claim to an interest in the land by commencing proceedings in the court of law. The respondent entered the caveat on the land on 1 October 1993. Even when he applied to the High Court on 4 January 2000 pursuant to s. 178 of the Sarawak Land Code for the extension of the caveat he did not commence any legal proceedings at all to enforce his claim of 1/4th beneficial interest in the land.

In the case of *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44, Lord Diplock held at p. 46:

> The purpose of a private caveat is to preserve the status quo pending the taking of timeous steps by the applicant to enforce his claim to an interest in the land by proceedings in the courts.

The Court of Appeal had held in *Lim Ah Moi v. AMS Periasamy a/l Suppiah Pillay* [1997] 3 CLJ 629 at 637 that:

> It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.
>
> Lord Diplock in *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 at p 215 put the matter in this way:
>
> > … once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried. (emphasis added).
>
> An illustration of the application of this principle is to be found in the case of *Teo Ai Choo v. Leong Sze Hian* [1982] 2 MLJ 12 where Sinnathuray J directed the removal of a caveat because of a delay of 11 months during which period no action had been filed. I emphasize the fact that delay was the sole reason for the removal of caveat in that case.

In *Hew Sook Ying v. Hiw Tin Hee* [1992] 3 CLJ 1325; [1992] 1 CLJ (Rep) 120, the Supreme Court removed the caveat because *(inter alia)* the caveator did not commence legal action to enforce her rights as alleged in the caveat. The Supreme Court held:

> Further, even assuming for one moment that the caveator had a caveatable claim to title or registrable interest, he should not delay in filing his claim in court on the alleged claim. In the Singapore case of *Teo Ai Choo v. Leong Sze Hian*, it was held that delay is fatal where at the hearing of an application to remove the caveat no writ was yet filed …

In this case the respondent lodged the caveat on 1 October 1993. He only filed the writ on 6 September 2000 and served it on the appellant on 7 December 2000. There is no explanation at all from the respondent for this delay of about seven years. We find this delay by the respondent is inordinate and inexorable and is fatal to the respondent's case. A careful reading of the learned Judicial Commissioner's judgment reveals that he did not address his mind at all to this issue of delay.

It is clear to us that the respondent's claim to 1/4 interest in the land by virtue of the trust deed, the first deed and the second deed is completely invalid and unsustainable. The trust deed was incompletely constituted and was invalid and null and void. Further the respondent was a mere volunteer. The subsequent two letters dated 12 August 1999 and 4 February 2000 respectively allegedly confirming the trust do not make the trust valid. For all the reasons that we have stated above we find that the respondent's claim of his beneficial interest in the land and the entry of the caveat on the land is plainly and obviously unsustainable. We therefore allowed the appeal with costs and ordered the caveat to be removed forthwith.

My learned brothers Tengku Baharudin Shah Tengku Mahmud JCA and Clement Allan Skinner J have read the draft and consented to it.